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QUESTIONS PRESENTED

I.

WHETHER EQUITABLE FORFEITURE OF A CO-OWNER'S INTEREST IN AN AUTOMOBILE, FOUND TO HAVE BEEN USED IN NUISANCE CONDUCT CONTRARY TO MICHIGAN'S NUISANCE ABATEMENT STATUTE, IS A "TAKING" REQUIRING JUST COMPENSATION SINCE THE STATE LAW, A VALID ENACTMENT UNDER MICHIGAN'S POLICE POWERS, FURTHERS INTERESTS OF THE PUBLIC BY REASONABLE MEANS, AND IN APPLICATION, AFFECTS A MINIMAL NUMBER OF INDIVIDUALS SUCH AS PETITIONER; and

II.

WHETHER DUE PROCESS OF LAW AND THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT ARE VIOLATED BY APPLICATION OF MICHIGAN'S NUISANCE ABATEMENT LAW TO A CO-OWNER OF A VEHICLE, WHICH OWNERSHIP INCLUDES A RESPONSIBILITY TO PREVENT, OR ANSWER FOR, COMMUNITY HARM CAUSED BY THE OTHER CO-OWNER'S MISUSE OF THE VEHICLE, WHERE OTHER STATUTES INCLUDE AN AFFIRMATIVE RESPONSIBILITY TO PREVENT, OR ANSWER FOR, INDIVIDUAL HARM CAUSED BY MISUSE OF A VEHICLE OR IMPOSE STRICT LIABILITY, IRREGARDLESS OF INTENT, INNOCENCE OR EXERCISE OF CARE AND THOSE LAWS ARE CONSTITUTIONAL IN APPLICATION.

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IN THE SUPREME COURT OF
THE UNITED STATES
OCTOBER TERM, 1995
NO: 94-8729

TINA B. BENNIS,

Petitioner,

vs.

STATE OF MICHIGAN,
ex rel. WAYNE COUNTY PROSECUTOR,

Respondent.

On Writ of Certiorari to the
Supreme Court of Michigan

STATEMENT OF THE CASE

In his opening statement, Mr. Bennis' attorney said the prosecution would not be able to show acquiescence by Tina Bennis. (TR-40).

During questioning of John Bennis by the prosecutor, Mr. Bennis asserted his Fifth Amendment right against self incrimination. (TR-50).

Testimony from a police officer indicated that during his surveillance in the area, he saw Kathy Polarchio flagging cars, waving her hands at them, for 10-15 minutes. The "flagging" was a known procedure used by prostitutes to cause customers to stop. (TR-61-63)

After John Bennis was seen stopping and allowing Ms. Polarchio to enter his car, the police followed him to a residential area, midway in the block, where his car stopped and the lights were turned off. (TR-63-65) After the police stopped behind the Bennis' auto, two heads were seen: a female on the right, a male on the left. Seconds later, the female head went down, disappearing toward the drivers side. (TR 65-66)

When the officer observed John Bennis and Kathy Polarchio engaged in fellatio in the Bennis' car, John Bennis had his pants pulled down. (TR-67)

After stating he had lots of complaints about prostitution in the Eight Mile Rd. area, the officer testified Ms. Polarchio had arrests for accosting and soliciting, indecent and obscene conduct, disorderly conduct-flagging, and disorderly conduct. The witness indicated he had assisted in numerous arrests in the area for prostitution. (TR-72-73)

Five residents then told the court of their exposure to the prostitution in the neighborhood: by seeing it or by being solicited for prostitution. (TR-90-141)

The last prosecution witness said that during his job as security for a nearby restaurant, he had seen John Bennis apparently trying to pick up prostitutes twice before. (TR-143-152)

During Tina Bennis' testimony, she told the court she and John Bennis had another car - a 1978 Olds - in addition to the 1977

Pontiac at issue. (J.A.11, TR-156)

In closing argument, the prosecutor cited a Michigan appellate case which concerned the guilty actions of a vehicle's co-owner "wiping out" the ownership interest of the "non-knowing" owner. (TR-164)

In its findings of fact, the trial judge said he was confining the decision to the facts of this case. (J.A. 13, TR-178) He was not going to take every car involved in prostitution, and he did not know what he would do with co-title owners: he would handle them on a case-by-case basis. (J.A. 13,27, TR-179,188) The judge explained he would exercise discretion: he might order one-half of the balance (after sale) to go to the innocent owner. He also opined that the civil remedy was designed to address the broader problem of public nuisance. (J.A. 22, TR-188-189) As to Tina Bennis' interest, the court said there would be

practically nothing left minus the costs. The car was to be sold, costs were to be deducted, and any balance was to go to the State of Michigan. (J.A. 25-26, TR-193-194)

Caselaw interpretations of Michigan's nuisance abatement statute have underscored the equitable nature of relief which might be granted. (See cases presented in respondent's brief, infra)

Nowhere in pleadings filed by appellants (John and Tina Bennis) in the Michigan Court of Appeals were there any arguments presented on constitutional issues. Only in appellees' brief in the Michigan Supreme Court did counsel for petitioner plead, and orally argue, the due process - innocent owner constitutional claim.

All justices who wrote or signed opinions in the Michigan Supreme Court

decision found no merit to constitutional claims made by Tina Bennis. (J.A. 45, et seq)

In the petition for certiorari filed in this Court, petitioner did not raise any argument as to burden of proof.

SUMMARY OF ARGUMENT

This matter arose from the nuisance use of a 1977 Pontiac, co-owned by John and Tina Bennis. John Bennis was arrested for gross indecency while he and a known prostitute were engaged in fellatio in that car. Under Michigan's nuisance abatement laws, a vehicle found to be a nuisance, or used to further "lewdness, assignation or prostitution..." (MCL 600.3801; MSA 27A.3801), may, after a trial in a court of equity be abated or sold to stop the nuisance.

Petitioner Tina Bennis claimed at the abatement trial that she had no knowledge of her husband's misuse of the car and, thus, her interest should not be abated or forfeited. The trial court, exercising equity discretion, concluded that a case-by-case analysis should be used and that, in the Bennis case, after deductions would be

made for expenses and costs as provided by law, petitioner's one half interest would be minimal. The trial judge also recognized that the state law did not require knowledge on the part of a defendant.

In the Michigan Supreme Court, petitioner's claims of a denial of due process and that the abatement was a compensable taking were denied. The majority opinion's reliance on Pearson Yacht and Van Oster was proper, given the similarity of those matters to the context of this cause, and the lack of controlling precedent from other courts.

The police powers of a state support constitutional enactments such as Michigan's nuisance abatement law, where the means delineated are reasonably necessary for the accomplishment of the purpose: protection of public safety, health and morals, and the

application of the law is not unduly oppressive on individuals.

The existence of strict liability laws, which expose innocent owners to liability for actions of others, requires affirmance of Michigan's nuisance abatement law, as applied and as written.

ARGUMENT

EQUITABLE FORFEITURE OF A CO- OWNER'S INTEREST IN AN AUTOMOBILE, FOUND TO HAVE BEEN USED IN NUISANCE CONDUCT CONTRARY TO MICHIGAN'S NUISANCE ABATEMENT STATUTES, IS NOT A "TAKING" REQUIRING JUST COMPEN- SATION UNDER CONSTITUTIONAL LAW SINCE THE LAW, A VALID ENACTMENT WITHIN THE STATE'S POLICE POWERS, FURTHERS PUBLIC INTERESTS BY REASONABLE MEANS AND, IN APPLICATION, IS NOT UNDULY OPPRESSIVE.

After John Bennis was found by Detroit police to have used the 1977 Pontiac co-owned by himself and his wife, Tina Bennis, (petitioner), in prohibited criminal and nuisance conduct[1], the Wayne County Prosecutor's Office filed a nuisance abatement action in circuit court. At trial, petitioner testified as to her lack of knowledge of the nuisance conduct involving

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1 Mr. Bennis and the prostitute who was performing fellatio on him were charged criminally with gross indecency, MCL 750.335; MSA 28.567. That the automobile was used in furtherance of that conduct subjected both Mr. Bennis and the vehicle to possible civil abatement (sale) of the car and a permanent injunction against defendant Bennis. MCL 600.3825; MSA 27A.3825.

the co-owned vehicle, and the trial judge, exercising his discretion as a court of equity, indicated petitioner's one-half interest in the car (ca.$300) would be so minimal after costs and expenses were deducted (when the car was sold) that he would order her interest forfeited. He indicated each case would be viewed on its facts. (J.A. 25-26)

An order was entered by the trial judge, and the vehicle was sold at public auction.

A. No "taking" occurred where the vehicle was not seized for public use.

The Michigan Constitution of 1963, Article 10, Section 2, entitled "Eminent domain; compensation" reads:

> Sec. 2 Private property shall not be taken for public use without just compensation therefor being first made or secured in a manner

> prescribed by law. Compensation shall be determined in proceedings in a court of record.

Within the Fifth Amendment to the U.S. Constitution is found the relevant phrase:

> ...nor shall private property be taken for public use, without just compensation.

That provision, in conjunction with the same statement in Michigan's Constitution, is claimed by petitioner to have been violated in the context of this cause. Because no taking for public use occurred, both provisions are inapplicable.

In Penn Central Transportation Company v City of New York, 438 U.S. 104, 98 S.Ct 2646, 57 L.Ed.2d 631 (1978), this Court held that the application of New York's Landmarks Law to property owned by the Grand Central Terminal did not constitute a "taking" within the meaning of the Fifth Amendment.

The zoning laws and land-use regulations at issue in Penn Central were said by the Court to be examples of programs that might adversely affect economic values without constituting a "taking". Further the Court explained, zoning laws attacked in court may be found to be reasonable enactments affecting "the health, safety, morals, or general welfare" which were proper although prohibiting particular contemplated uses of land. Even though land-use regulations destroy or adversely affect real property interests, they may be upheld where they serve a substantial public purpose.[2]

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2 Cited in Penn Central, supra, were Goldblatt v Hempstead, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962), involving the affirmance of a town ordinance regulating dredging and pit excavating as a valid police regulation as applied to the defendants' property; and Hadacheck v Sebastian, 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348 (1915): affirming a municipal ordinance, enacted as a police measure, prohibiting brickmaking within a designated area, as not taking

The Court recognized the need in Penn Central to review factors involved in interpretation of the takings clause. At 98 S.Ct. 2659, this Court explained:

> The question of what constitutes a "taking" for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. While this Court has recognized that the "Fifth Amendments's guarantee ...(is) designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," Armstrong v United States, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960), this Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportion- ately concentrated on a few persons. See Goldblatt v Hempstead, 369 U.S. 590, 594, 82 S.Ct. 987, 990, 8 L.Ed.2d 130

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2 (Cont'd)
without due process of law the property of the owner of a tract of land within the prohibited area, although the land had clay-deposits suitable for brick-making which could not be removed to elsewhere, and the owner had used the land for brickmaking.

> (1962). Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances (in that) case." United States v Central Eureka Mining Co., 357 U.S. 155, 168, 78 S.Ct. 1097, 1104, 2 L.Ed.2d 1228 (1958). (Emphasis added).

The "particular circumstances" of this case show that petitioner, by the equitable abatement of the co-owned vehicle, was not forced to bear a "public burden", but, rather, that she, after notice and opportunity to be heard, was subjected to loss of her interest in the nuisance vehicle, after the court said it would decide such matters case-by-case, and after he reasoned that her $300 interest would be severely depleted by the expenses and costs which would be applicable per law.[3] (J.A. 25-26)

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3 MCL 600.3825 (3); MSA 27A.3825(3) requires "expenses of keeping such property" and the "costs of such sale"

Equally important for consideration is the fact there was no taking for "public use". Unlike cases involving either condemnation or restriction of private property use to benefit the public, e.g. Penn Central, supra; Dolan v Tigard, 512 U.S. ---, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994) (property to be used for pathway); Lucas v South Carolina Coastal Council, 505 U.S. ---, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992) (denying development of coastal-zone land),[4] this matter was culminated by legislatively-required sale of the property ordered abated. The only "public" benefit from the sale was nuisance abatement. The car was sold and the proceeds disbursed as required by law.[5]

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3 Cont'd
to be deducted from sale proceeds, after which the remainder is to be paid to the state treasurer.

4 Most "takings" cases involve real property rather than vehicles; thus the logical ease with which the term "public use" is applied. See, for example, Hadacheck and Lucas, supra.

5 Under the "police power" argument,

(This is not to say each time a vehicle is the subject of a nuisance abatement cause, it must be sold. In prior cases, Michigan's courts, exercising equity jurisdiction, have ordered less than sale of the vehicle, see People v Tate, 306 Mich 667, 669, 11 N.W.2d 282 (1943) (5 month non-use of vehicle), or padlock of the building or place, see State v Bernstein, 57 Mich App 204, 206, 226 N.W.2d 56 (1974) (building could open after certain time).

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5 infra, the nuisance abatement law seeks to uphold the public good rather then punish an individual. The problem addressed by nuisance laws is the chronic blight nuisance conduct perpetuates on a community and its components. By providing for a remedy in addition to possible criminal charges, a state or municipality seeks another legal avenue to eradicate the problem. As this Court said in Stanley v Illinois, 405 US 645, 656, 92 S.Ct., 1208 31 L.Ed.2d 551 (1972), "The establishment of prompt efficacious procedures to achieve legitimate stated ends is a proper state interest worthy of cognizance in constitutional adjudication." Michigan's nuisance abatement law is such an "efficacious procedure".

B. Since the nuisance abatement proceeding is a matter tried in equity, abatement by sale of a vehicle found to be a nuisance is not the rule: the court may fashion a remedy to fit the problem.

Faced with interpretation of the apparent mandatory language of MCL 600.3825; MSA 27A.3825, directing padlock of a building or place found to be a nuisance, or directing sale of a vehicle likewise found to be a nuisance, the Michigan Supreme Court in People v Holschuh, 235 Mich 272, at 275-276, 209 N.W.158, (1926) stated (in pertinent part):

> ...The inherent powers of the court of equity are safeguarded by the Constitution and are not subject to be brushed aside or rendered supine by legislative mandate. ... The court will enforce valid legislation and its powers will respond thereto, but when legislation seeks to control judicial action to the extent of dictating the substance of decrees and forbidding any lesser degree of restraint, regardless of equity and justice, there is a departure from legislative power and an unwarranted interference with judicial power.

Further, the Michigan high court held

the nuisance law did not mandate padlocking the entire premises at issue and selling the furniture and fixtures, but rather only the contents of the exact place employed in violating the law were to "be seized and sold." (Id, at 276.)

The Holschuh court also upheld the circuit judge's action in refusing to lock the building for one year. (Id, at 277.)

An equity court has the power to enjoin a nuisance. It is the policy of courts, however, to tailor the remedy to the problem before the court. (See Norton Shores v Carr, 81 Mich App 715, 724, 265 N.W. 2d 802 (1978)).

The trial record here clearly reveals the court recognizing and exercising proper equity power in addressing the problem before it. The court indicated nuisance vehicle cases might be addressed case-by-case, and that the results of each matter

could vary. (J.A. 26) Then the judge looked to the facts of this case and fashioned an appropriate remedy. As the Michigan Supreme Court held on this point, at p.742 of Michigan v Bennis, 447 Mich 719, 527 N.W.2d 483 (1994): "...We merely sanction the trial judge's action, which is clearly permitted under the nuisance abatement statute, and find that such action was not an abuse of discretion."

In affirming, a reviewing court should restate that this nuisance abatement action was an equity matter and that sale of any interest in a vehicle, found to fall within the prohibitions of the statute, is not mandated but is discretionary, the matters being decided case-by-case.[6]

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[6] Although not in the record before the Court, it may be instructive to point out that since the re-institution

Sale of a co-owner's interest is not required by a court of equity in Michigan in a nuisance abatement action. In application the statute is fair.

C. The broad concept of a state's police powers may encompass an isolated situation where a private individual sustains harm in proper enforcement of valid state laws.

"It (police power) is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance." Lawton v Steele, 152 U.S. 133, 14 S.Ct. 499, 38 L.Ed. 385, 388 (1894).

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[6] Cont'd
of the vehicle seizure program in Wayne County after Bennis was decided in December, 1994, over 1500 vehicles have been seized. [January to September, 1995] Only four trials have been set, and none have involved a co-owner situation as here.

At issue in Lawton was the constitutionality of a New York law forbidding the use of fishing nets within one mile of shore of certain named waters. The statute declared the net to be a public nuisance which might be "...abated and summarily destroyed by any person". Id, at 38 L.Ed.388.

This Court, in reaching the conclusion that the act was constitutional, spoke at length as to what the term police power entailed. After giving examples of application of the police power, the majority opinion explained:

> "...The state may interfere whenever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests. (Cases cited omitted.) To justify the state in thus interposing its authority on behalf of the public, it must appear first, that the interests of the public generally,

> as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. ...In other words, it's (legislature) determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the court." Id, at 38 L.Ed., 388-389. (Emphasis added)

The Court then upheld the action of the state officials in seizing the nets as nuisances and summarily destroying them.

By comparison to Lawton, the context of this case should make it clear that Michigan's nuisance abatement laws as applied provide due process of law for those affected, address a public interest requiring state interference (perpetuation of nuisance conduct), and provide means to address the interest which are reasonably necessary for the accomplishment of the purpose.

The legislature recognized that the problem of several forms of nuisance conduct

could only be attacked by abatement laws which focused attention on the building, place, or vehicle involved in nuisance matters.[7] That there existed criminal laws dealing with the same conduct punishing individuals clearly did not (and does not) solve the problem.

Michigan's nuisance abatement laws were enacted to address the nuisance conduct, and the means by which it was perpetuated.

Initially, the laws dealt with "lewdness, assignation or prostitution", gambling, and illegal sales/dealings in alcoholic beverages.[8] As the mores of the times changed, so, too, did the nuisance law. It was amended to include activities

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7 This is in conjunction with any applicable criminal statutes Michigan has enacted, whose goal is punishment of the individual committing the nuisance act. See, for example MCL 750.301; MSA 28.533 et seq. dealing with gambling.

8 See People v Tate, supra; People v Bitonti, 306 Mich 115; 10 N.W.2d 319 (1913) both dealing with

dealing with controlled substances. Now, Michigan's nuisance abatement laws aim at solutions to public problems by targeting the means with which individuals commit the nuisance conduct.[9]

Because the means targeted by the law are property owned or controlled by one or more persons, there arises the possible constitutional conflict of government versus

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8 Cont'd
others using an auto in nuisance conduct, and the acts being abated; People v Bernstein, supra, where a bar was closed because of prostitution activity; and State v Levanburg, 406 Mich 455; 280 N.W.2d 810 (1979), involving assignation for prostitution.

9 As stated in Kingsley Books v Brown, 354 U.S. 436, 77 S.Ct. 1325, 1 L.Ed.2d 1464 (1957), at 1 L.Ed; 2d 1474:

> It is not for the United States Supreme Court to limit a state in its resort to various weapons in the armory of the law; whether proscribed conduct is to be visited by a criminal prosecution, or by a qui tam action, or by an injunction, or by some or all of

property rights. Do an individual's property rights outweigh a government's ability to exist? The answer is "No".

The Tenth Amendment of the U.S. Constitution confers upon the states the broad police power to enact statutes such as Michigan's nuisance abatement laws. Thus, property rights are not absolute, but must bend in a reasonable manner to the legitimate enactments of government.

In Nebbia v New York, 291 U.S. 502, 54 S.Ct. 505, 78 L. Ed. 940, 948-949 (1934), the Court stated: "Neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm." At 78 L.Ed. 950, the court continued "... And the

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9 (Cont'd)
these remedies in combination, is a matter within the state legislature's range of choice.

guarantee of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."[10]

Michigan's nuisance abatement law is neither unreasonable nor arbitrary nor capricious. The "means selected", seeking to abate by sale or injunction property items used in nuisance conduct, have a real and substantial relation to the ends sought: eradication of nuisance activities.

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10 In Home Building and Loan Association v Blaisdell, 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed., 413 (1934), a state statute which abrogated mortgage foreclosures was upheld, with the Court's opinion indicating the state's police power, as applied, overruled the constitutional right to contract, affirming the state's authority to safeguard vital interests of its citizens. In Lucas v South Carolina Coastal Council, supra, at 120 L.Ed.2d 817: "The government may, consistent with the Takings Clause, affect property values by regulation without incurring an obligation to compensate

The laws are necessary regulations to secure the health, safety, good order, comfort and general welfare of the community. Atlantic Coast Line R. Co. v Goldsboro, 232 U.S. 548, 34 S.Ct. 364, 58 L.Ed. 721 (1914).

Additionally, application of either a strict scrutiny analysis, or a rationally related standard would not defeat Michigan's nuisance laws. The former standard, which holds that before a state may invade the enumerated constitutional rights of an individual, it must show a compelling state interest and the ability to accomplish the interest with a narrowly drawn statute, is met by Michigan's nuisance laws: the compelling interest was the chronic need to address nuisance problems, with clearly focused language.

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10 (Cont'd)
- a reality we nowadays acknowledge explicitly with respect to the full scope of the state's police power."

The latter standard likewise can be applied to the statutes because the laws have a reasonable relationship to a proper legislative purpose, and are not discriminatory nor arbitrary. They narrowly aim to attack forms of conduct which adversely affect the overall good of society. And they are applied equally to all named "means" used in the nuisance conduct, as well as to the individuals committing the nuisance.

That an individual or group of individuals may be in some way harmed by application of a state law under its police powers is obvious. There may be a curtailing of certain real property rights,[11] or the loss of an item of property,[12] or the issuance of an

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11 Lucas v South Carolina Coastal Council, supra.

12 Van Oster v Kansas, 272 U.S. 465, 47 S.Ct. 133, 71 L.Ed. 354 (1926)

injunction issued forbidding conduct.[13] But if substantive and procedural due process[14] are complied within the application of the legislation, and no other constitutional impediments exist, a state statute furthering police powers is constitutional and must be affirmed.[15]

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13 State v Dizzy Duck, 203 Mich App 250; 511 N.W.2d 407 (1994), rev'd ___ Mich ___, slip opinion released July 25, 1995; nos 98804, 98805.

14 This Court in Ingraham v Wright, 430 U.S. 651, 97 S. Ct. 1401, 51 L.Ed.2d 711 (1977), at 51 L.Ed.2d 732 said this about due process: "... Representing a profound attitude of fairness... 'due process' is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess" (Case cited omitted)

15 The reasonableness of the law is not a question for the courts, but for the legislature. Sproles v Binford, 286 U.S. 374, 388, 52 S.Ct. 581, 76 L.Ed. 1167 (1932). However, should a legitimate question as to reasonableness arise, the Court might utilize the test set forth in Goldsboro, supra: 1) The nature of the menace against which the statute will protect, 2) The availability and effectiveness of other less drastic

Petitioner's claim to be an innocent owner is not decisive. Tina Bennis may not have known that John Bennis and a prostitute were committing fellatio in a residential area, but the record shows Mr. Bennis had been seen earlier talking with prostitutes, while in an auto (possibly the Bennis' second car - the 1978 Oldsmobile).

Additionally, it could be argued that, at the time of the trial, Tina Bennis was a co-owner of the 1977 Pontiac in name only: not the actual "owner" who exercised dominion and control over the Pontiac (especially since it appears John Bennis used that car to go to and from work). (See

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15 (Cont'd)
protective steps, and 3) The loss which the grieved party will suffer from imposition of the law. Here, the menace of nuisance conduct is put before a neutral magistrate, exercising equity discretion, and each case may result in different conclusions.

U.S. v A Single Family Residence, 803 F.2d 625, 630 (11th Cir. 1986); and Commonwealth v One 1986 Volkswagon GTI, 417 Mass. 369 (1994), the latter two matters dealing with record owner versus actual owner).

The significance of these two points detracts from the facial impact the term "innocent owner" has: even innocence is relative, and perspective is important.

Footnote 10 of Austin v U.S., 509 U.S. ___, 113 S.Ct. 2801, 125 L.Ed. 2d 488 (1993), does not require a foregone conclusion when this Court hears "innocent owner".[16] Rather, the fact that each nuisance abatement matter involving co-owners will be subject to differing remedies depending on the particular facts,

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16 In U.S. v One Ford Coupe Automobile, 272 U.S. 321, 47 S.Ct. 154, 71 L.Ed. 279, (1926), this Court

and that Michigan's nuisance abatement laws are valid, reasonable exercises of the state's police powers furnish the Court with two solid reasons to affirm the decision in the state court.

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16 Cont'd
allowed forfeiture of the interest of a company having no guilty knowledge of the use of the vehicle for an illegal purpose; in Van Oster, supra, after mentioning legislation which imposed "liability on owners of vehicles for the negligent operation by those entrusted with their use", 71 L.Ed. at 358, the Court affirmed the state law nuisance action which forfeited the car; and in Goldsmith, Jr.- Grant Co. v U.S., 254 U.S. 505, 41 S.Ct. 189, 65 L.Ed. 376 (1920), the Court upheld forfeiture, under federal law, of a vehicle wherein the seller had reserved title in it, but had no knowledge of its illicit use.

II. DUE PROCESS OF LAW AND THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT ARE NOT VIOLATED BY APPLICATION OF MICHIGAN'S NUISANCE ABATEMENT LAW TO A CO-OWNER OF A VEHICLE, WHICH OWNERSHIP INCLUDES A RESPONSIBILITY TO PREVENT, OR ANSWER FOR, COMMUNITY HARM CAUSED BY THE OTHER CO-OWNER'S MISUSE OF THE VEHICLE, WHERE OTHER STATUTES INCLUDE AN AFFIRMATIVE RESPONSIBILITY TO PREVENT, OR ANSWER FOR, INDIVIDUAL HARM CAUSED BY MISUSE OF A VEHICLE OR IMPOSE STRICT LIABILITY, IRREGARDLESS OF INTENT, INNOCENCE OR EXERCISE OF CARE AND THOSE LAWS ARE CONSTITUTIONAL IN APPLICATION.

A. Michigan's statute, by its language, impliedly imposes on a vehicle owner a duty to ensure that the vehicle not be used contrary to statutory proscriptions; and knowledge of the misuse is not required.

The clear words of the statute, as applied to vehicles, state: "Any ... vehicle ... used for the purpose of lewdness, assignation or prostitution... is hereby declared a nuisance ... and nuisances shall be enjoined and abated." MCL 600.3801; MSA 27A.3801. There are no words or phrases which exempt a co-owner of a vehicle. On the contrary, an additional statute, MCL 600.3815(2); MSA 27A.3815(2) specifically explains that "Proof of knowledge or the

existence of the nuisance on the part of the defendants or any of them, is not required".

It should be clear that a legislature may enact laws which exclude the element of knowledge. In Chicago, B. and Q.R. Co. v U.S., 220 U.S. 559, 31 S.Ct. 612, 55 L.Ed. 582 (1911), this Court upheld the penalty imposed upon a carrier in interstate commerce for violation of the safety appliance acts of Congress. As to the claim that the particular statute exacted a penalty and should be governed by criminal procedure, the Court exclaimed:

> 'The contention that because the exaction which the statute authorizes the Secretary of Commerce and Labor to impose is a penalty, therefore its enforcement is necessarily governed by the rules controlling in the prosecution of criminal offenses, is clearly without merit, and is not open to discussion.' If the statute upon which the present action is based had expressly or by implication declared that the penalty prescribed may only be recovered by a criminal proceeding, that direction must have been followed. The power of the

> legislature to declare an offense, and to exclude the elements of knowledge and due diligence from any inquiry as to its commission, cannot, we think, be questioned. (Id, at 55 L.Ed. 588-589) (Emphasis added)

Different from but, as applied, very similar to the federal railroad car safety appliance act above, Michigan's nuisance abatement laws likewise "exclude the elements of knowledge". Addressing as it does the social problem of nuisance conduct, Michigan's law imposes on any proper defendant "strict liability": if his or her vehicle is used to perpetuate nuisance conduct, it may be forfeited.

There is nothing inherently unconstitutional in legislation which does away with the concept of knowledge.[17] Chicago, B.Q.R.Co, supra. Any allegation of unconstitutionality, then, could only arise from how the legislation is applied in a

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17 As Justice Harlan stated in Chicago, Burlington, and Quincy Railroad, Co., supra at 55 L.Ed.588,

particular factual context. But, as explained in the previous argument, the application here provides no foundation for a constitutional claim by petitioner. Tina Bennis received a hearing in court, and she presented her story. No denial of procedural or substantive due process existed.

As written, the Michigan law subjects all who might become nuisance abatement defendants to the possible equitable penalty of loss of the property at issue, even though the action is brought in personam.[18] Given the state legislature's ability

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17 Cont'd
recognizing the parameters of court review: "The Congress...has prescribed and defined the duty by statute. We have nothing to do but to ascertain and declare the meaning of a few simple words in which the duty is described"

18 Most courts have dropped the oft-used practice of naming the vehicle as the "offending item", but some of Michigan's nuisance abatement cases are filed with the property (a building for example) named in rem along with the

to word laws without specifying an "innocent owner" defense, and the logical consequence that those laws as applied are sustainable, petitioner's repeated claim that MCL 600.3815(2); MSA 27A.3815(2) is unconstitutional fails.

1. Precedent exists in state and federal courts as to laws which impose strict liability upon an "innocent" offender; thus, reason exists for affirmance of Michigan's nuisance abatement act with its "no need to show knowledge" phrasing.

A Mr. Morisette, admitting at trial he believed the shell casings he had taken (and sold) from a government bombing range were abandoned, was convicted under federal law for "knowingly converting government property." This court, in Morissette v U.S., 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1951), reversed, explaining that an

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18 Cont'd
other appropriate defendants named in personam. Naming the persons as defendants eases the court's ability to enjoin all or some of them from the nuisance conduct as facts dictate.

"essential prerequisite" of criminal liability was criminal intent, correcting the trial court's refusal to instruct that defendant may have acted without wrongful or criminal intent.

Footnote 13, in Morissette, at 96 L.Ed. 296, reads:

> The development of strict criminal liability regardless of intent has been roughly paralleled by an evolution of a strict civil liability for consequences regardless of fault in certain relationships, as shown by Workmen's Compensation Acts, and vicarious liability for fault of others as evidenced by various Motor Vehicle Acts. (Emphasis added).

Those laws referred to in the footnote were the "...increasingly numerous and detailed regulations which heighten the duties of those in activities that affect public health, safety or welfare," addressing "public welfare offenses". Id, at 96 L.Ed. 296.

Michigan's nuisance abatement laws are legislation addressing "public welfare offenses": the nuisance conduct addressed in the law is offensive to the public morals, welfare, safety, and health. The strict liability set forth in the civil application of the statute does not address nor provide for a claim of exercise of care or innocence as to the facts. Any "defense" may be presented at the trial, but innocence does not excuse the conduct or potential abatement of property used.

The Morisette opinion explained: "such offenses ... may be regarded as offenses against (the state's) authority, for their occurrence impairs the efficiency of controls deemed essential ... to the social order...". (Id. at 96 L.Ed.296)

Vehicles that are used in furtherance of prostitution nuisance conduct "impair" the government control laws are meant to

have on an ordered society. The criminal offense committed, with the possibility of loss of freedom for the offender, and the use of a vehicle to commit the act, require that all rational steps available to a government be applied to reasonably combat the problem affecting the social order.

To do so is to give effect to those regulatory measures exercised by a governmental entity within the police power where "the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of crimes." (Justice Taft in U.S. v Balint, 258 U.S. 251, 252, 42 S.Ct 301, 66 L.Ed. 605 (1922), cited in Morissette, supra, at 96 L.Ed. 298)

The federal law addressed in Chicago, B. and Q. R. Co., supra, imposed strict liability on those affected: there was an absolute duty to comply. Even though the

defendant had exercised reasonable care, the Court upheld the lower judgment, exclaiming that a civil duty had a civil consequence. Id, 55 L.Ed. 586.

As to the claim the law imposed a "harsh construction", Justice Harlan wrote in Chicago B. & Q.:

> To this we reply that, if it be the true construction, its harshness is no concern to the courts. They have no responsibility for the justice or wisdom of legislation, and no duty except to enforce the law as it is written, unless it is clearly beyond the constitutional power of the law making body, (Emphasis in original) (Id, 55 L.Ed. 588)

An 1884 Michigan case People v Roby, 52 Mich 577, 18 N.W. 365 (1884), illustrates the co-existence of strict liability and lack of knowledge. A state law provided that all saloons had to be closed on Sundays. Any person who violated the requirement was guilty of a misdemeanor.

The respondent Roby was prosecuted under the law after a clerk opened the saloon (located in Roby's hotel) on Sunday and sold a drink to another. Roby was not present, although he was on the hotel premises. There was no evidence Roby agreed to or knew of the saloon being open that day. Yet he was convicted for not keeping his bar closed.

Discussing the matter, Justice Cooley, writing the Michigan Supreme Court's opinion, said the following:

> It is contended... that to constitute an offense... there must be some evidence tending to show an intent on the part of the respondent to violate it. ...The section under which Roby is prosecuted makes the crime consist, not in the affirmative act of any person, but in the negative conduct of failing to keep the saloon, etc., closed.
>
> ... Many statutes which are in the nature of police regulations, as this is, impose criminal penalties irrespective of any intent to violate them; the purpose being to require a degree of diligence for

the protection of the public which shall render violation impossible. (Id., at 579)

Roby's lack of knowledge of the incident, the defendant's exercise of due care in Chicago, B. and Q., supra, and petitioner's cry of "innocent owner" here sound much the same: each is a claimed defense to the strict liability set forth in the particular law at issue. In civil matters legislative enactments with no "innocent owner" defense or proclaiming that lack of knowledge is no defense are valid unless applied improperly.[19] Such was not the case here.

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19 Compare, however, state statutes from Tennessee: Tenn. Stat. 40-33-210, Criminal Procedure, Forfeitures, which requires the state to prove the co-owner was either a co-conspirator, or knew the property was illegal, or knew it was being used illegally before forfeiture can be ordered; Florida: Fl.St. 932.703, concerning the state Contraband Forfeiture Act, which allows an "innocent owner" to establish the innocent owner defense, and which recognizes the interest of that person

B. The parallel between Michigan's civil liability law, which subjects an innocent co-owner of a vehicle to extreme liability where the vehicle was misused by the other co-owner and caused individual harm, and this nuisance abatement law, which may subject the innocent co-owner of a vehicle to possible forfeiture of that person's interest, when the vehicle was used in nuisance conduct by the other co-owner and caused community harm, requires a reviewing court to affirm the lower court.

In Michigan, as in other states, the owner of a motor vehicle shall be liable for any injury caused by improper use of the vehicle, no matter who drives the car, if

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19 Cont'd
by requiring payment for their share; and Colorado: C.R.S. 16-13-301 et seq., Abatement of Public Nuisance, in 16-13-303 setting forth the Pearson language for an "innocent owner" defense. Note that California's Public Nuisance Law, Cal. Vehicle Code 22659.5, requires a conviction before a nuisance vehicle may be declared a nuisance; then allowing a 48 hour impoundment if the offender violates the injunction as to the car.

the owner consented or knew the other person who was driving. After an injury has been caused with the owner's vehicle, it is no defense to liability for the owner to claim innocence.[20]

Three Michigan cases are illustrative. Hawkins v Ermatinger, 211 Mich 578, 179 N.W. 249 (1920), presented facts showing the defendant's auto driven by his son and causing injury. The defendant interposed that he had given orders to the garage where the car was kept not to allow the son to use the vehicle. Also, the defendant said he had told his son not to drive the car. Lastly, the defendant said the vehicle was taken without his knowledge and consent.

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20 Other examples of strict liability statutes can be found discussed in: East River S.S. Corp. v Transamerica Delaval, Inc., 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed.2d 865, (1986); and Todd v Societe Bic, S.A., 21 F.3d 1402 (7th Cir. 1994).

The applicable statute had a clause exempting the owner from liability where the car was driven without his express or implied consent or knowledge. The court phrased the question as to the ability of the legislature, in the exercise of the police power, to impose liability on the owner for damage caused by negligent operation of the vehicle by a family member who was using it without permission and contrary to orders. (Id., at 582)

After reviewing several cases, the court opined that the meritorious question presented was: "Is this provision in question a reasonable regulation?" (Id, at 584) The Court then stated that the duty to determine reasonableness rested on the legislature and "this court should only interfere when constitutional rights are invaded". (Id, at 585)

Prior to affirming the validity of the law as applied, the Michigan court quoted Commonwealth v Alger, 7 Cush. (Mass), 53:

> It is a well-settled principle, growing out of the nature of well-ordered civil society, that every holder of property, ... holds it under the implied liability that his use of it may be so regulated that is shall not be injurious to the equal employment of others having an equal right to the employment of their property, nor injurious to the rights of the community. (Hawkins, at 586)

Saying the act involved the public policy of the state, and its "regulation of the use of such vehicles" (Id, at 588), the court said the law was within the power of the legislature to enact, and that the legislature may have "considered the impossibility of the plaintiff meeting such a defense and the necessity of providing against it". (Id)

Stapleton v Independent Brewing Co., 198 Mich 170, 164 N.W. 520 (1917),

(reviewing application of the same law as in Hawkins, supra), held the owner liable for injury caused by his vehicle, driven by an employee of the company to which the owner had lent it. Concluding that the statute was within the police power of Michigan, the court repeated that an automobile owner is supposed to know about those to whom the vehicle is entrusted.

A 1913 case, Daugherty v Thomas, 174 Mich 371, 140 N.W. 615 (1913), examined the predecessor to the statute at issue in Stapleton and Hawkins, supra. Although concluding that one segment was unconstitutional and must be excised, the court's dicta contained relevant discussion.

They said an "owner of property is one who has dominion over it", (Id, at 375), and that the police powers of a state allow

broad latitude as regards property.[21] Finding subdivision 3 of a section of the law "not a necessary regulation in the exercise of the police power", the court struck it, but upheld the remainder of the law.

The thread running through those three cases of strict liability on an owner finds a modern counterpart in the nuisance statute here: lack of knowledge is no defense.

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21 The Daugherty opinion made pointed reference to extensive quotes from Volume 1 of Tiedeman on State and Federal Control of Persons and Property and from Justice Marshall in a Wisconsin case. Pertinent is a portion of the quote from Justice Marshall:
(The) police power extends to and permits legislation regulating reasonable matters appertaining to the public welfare, since everything beyond that must necessarily fall at the threshold of some constitutional defense". Petitioner claims her innocent owner" defense is that "constitutional defense" and is required; respondent argues that a police power allows the result here.

Young v Masci, 289 U.S. 253, 53 S. Ct. 599, 77 L.Ed. 1158 (1932), also dealt with a similar state auto liability law. The New York legislation made the auto owner liable for the negligent use of the vehicle by any person using it with permission. Denying owner Young's claim,[22] this Court stated in part, that the "statute makes mere permission to use the car the basis of liability in case of negligent injury". (Id., at 77 L.Ed. 1162)

Mere permission by petitioner, Tina Bennis, to John Bennis to use the 1977 Pontiac, the family's second car, to go back and forth to work subjected Tina Bennis to the strict liability of Michigan's nuisance

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22 Young only challenged N.Y. law as it applied to a nonresident owner who made the bailment outside New York and who was not in the state at the time of the accident. (Young v Masci, supra, at 77 L.Ed. 1160).

law when her husband consorted with a prostitute in a residential area. His community harm subjected petitioner to the possible loss of her interest in the car, in spite of her innocence.

It would be highly ironic, and constitutionally inexplicable, to hold that if John Bennis on the night in question had driven the car into the prostitute and caused her physical injury, Tina's interest in the car and all her other assets would be liable to a civil judgment of unlimited amount in favor of the prostitute because of Tina's ownership responsibility, but to protect the residents of the Detroit neighborhood where this vice-market was operating, a sanction of $300 against Tina for breach of the same ownership responsibility is unconstitutional.

The appellants in Hawkins, Stapleton, Daugherty and Young were involved in

situations concerning individual harm; the Bennis' car was involved in damage to the community: adding to the prostitution problem and encouraging its continuance. Michigan's police power regulation, MCL 600.3801; MSA 27A.3801, expressly indicates that public good outweighs an individual's isolated claim and may result in forfeiture of the individual's interest. The statute and its application are valid and meet constitutional tests. The trial court's decision should be affirmed.

CONCLUSION

Because of the above-stated reasons, the judgment of the Michigan Supreme Court as to petitioner Tina Bennis should be affirmed.

Respectfully submitted,

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LLR/jh